

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CHAD ELDER

Claimant

VS.

MID KANSAS SEAMLESS

Respondent

AND

AMERICAN INTERSTATE INS. CO.

Insurance Carrier

Docket No. **1,047,041**

ORDER

Claimant requests review of the February 9, 2012 Award by Administrative Law Judge John D. Clark. The Board heard oral argument on May 16, 2012.

APPEARANCES

Melinda G. Young of Hutchinson, Kansas, appeared for the claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that the record included the Transcript of the Deposition of George G. Fluter, M.D., dated September 28, 2011.

ISSUES

Claimant fell off a ladder while working on March 23, 2009, and again on June 23, 2009. Claimant admitted he was sore after the first fall but recovered without permanent injury. After the fall on June 23, 2009, claimant was taken to the emergency room with complaints of ankle and back pain. As a result of the second fall, claimant alleged he suffered permanent impairment to his ankle and back and sought compensation for a work disability. Respondent argued claimant's impairment was limited to his lower extremity.

The Administrative Law Judge (ALJ) found claimant sustained a 5 percent impairment to his left lower extremity based upon Dr. Stein's rating.¹

Claimant requests review of the nature and extent of disability. Claimant argues that he is entitled to a whole body impairment and a work disability pursuant to K.S.A. 44-510e(a).

Respondent argues that claimant failed to sustain his burden of proof that he suffered a permanent impairment to his back and is not entitled to a work disability. Respondent further argues the ALJ's Award should be affirmed.

The sole issue raised on review is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein except as hereinafter noted.

Briefly stated, on June 23, 2009, claimant suffered a fall when the ladder that he was on collapsed. He injured his head, back, elbow and ankle in the fall. Claimant was taken to the hospital. Treatment included x-rays of his back and ankle as well as pain medication. The emergency room doctor referred claimant to a specialist for his left ankle injury. Dr. Erik Severud, an orthopedic surgeon, performed surgery on claimant's left ankle in September 2009. After surgery, claimant wore a boot immobilizer and used crutches for several months. Three weeks of post-op therapy was prescribed and completed by claimant.

The claimant's employment with respondent was terminated in July 2009 when it was discovered claimant was operating his own roofing company which violated a non-compete agreement he had with respondent guttering company.

On October 22, 2009, the ALJ ordered an independent medical examination by Dr. Paul Stein, a board certified neurosurgeon, to determine whether claimant is in need of medical treatment for his low back and if so, whether the medical treatment is related to his accidental injury of June 23, 2009. The doctor reviewed claimant's medical records.

¹ Dr. Stein's rating for the left lower extremity was 7 percent.

Dr. Stein performed a physical examination on November 17, 2009, and recommended physical therapy for claimant's low back for a period of 1-2 months, 3 times a week. At the time of the evaluation, claimant stated that he had tenderness to palpation in his lower back and moderate limitation in terms of range of motion. Dr. Stein concluded that claimant had a strain/sprain of his lower back in March 2009 and then suffered a fall in June 2009. The doctor opined claimant had back symptomatology from the incident in March 2009 and then he suffered an aggravation to his lower back in the incident in June 2009.

It is significant to note claimant did not cooperate and attend the physical therapy recommended by Dr. Stein nor did claimant seek any additional medical treatment for his back or ankle after October 2009.

Claimant testified that he worked at Tyson's for approximately three months beginning January 2010. Claimant's job was cleaning machines with a power washer. Claimant voluntarily quit his employment with Tyson due to his ankle flare-ups. He hasn't worked since this job. As of February 23, 2011, claimant's business, All American Roofing, was actively marketing the business but claimant testified no roofing jobs were being done. However, records stipulated into evidence indicate claimant was hired at Tyson's on February 12, 2010 and his employment was terminated on August 3, 2010, for attendance violations. Moreover, when claimant applied for the job with Tyson's he specifically denied any back problems and underwent a physical assessment of his back including flexion, and rotation with a notation that all the findings were normal.

The determination whether claimant is entitled to a work disability is dependent upon whether he suffered a K.S.A. 44-510d scheduled disability or a K.S.A. 44-510e whole person impairment.

Dr. George Flutter, board certified in physical medicine and rehabilitation, examined and evaluated claimant on September 28, 2010, at claimant's attorney's request. The doctor reviewed claimant's medical records and also took a history from him. Upon physical examination, Dr. Flutter found claimant had tenderness to palpation over the medial and lateral ligament complexes of the left ankle, reduced pinprick sensation in the left foot compared to the right and also reduction in terms of extension and planta flexion of the left ankle when compared to the right. Claimant had back pain with simulated trunk rotation and axial loading as well as tenderness to palpation in the lumbar paravertebral muscles, posterior superior iliac spine and sacroiliac joints bilaterally. Forward flexion and hyperextension of the low back caused him pain. Dr. Flutter diagnosed claimant with a left ankle fracture, low back pain with lumbar strain/sprain and myofascial pain affecting the lower back.

Based on the *AMA Guides*², Dr. Flutter opined claimant had a 7 percent left lower extremity impairment due to mild ankle range of motion deficits and an additional 2 percent impairment due to osteochondritis dissecans affecting the talus. The two lower extremity impairments combine for a 9 percent to the leg or convert to a 4 percent whole body impairment. The doctor also provided a 5 percent whole person impairment as a result of claimant's myofascial pain affecting the lumbosacral spine and also nonuniform alteration in lumbar range of motion. Using the Combined Values Chart, the whole body impairment ratings result in a 9 percent.

Dr. Flutter restricted claimant to bending, stooping, crouching, twisting, squatting, kneeling, crawling and climbing to an occasional basis. The doctor opined that claimant was not capable of performing 13 out of the 21 tasks identified by Dr. Robert Barnett. Dr. Flutter opined that claimant had a 62 percent task loss.

Dr. Paul Stein examined and evaluated claimant again on June 22, 2011. Upon physical examination, the doctor noted claimant walked with a slight left-side limp and he had slight weakness of the dorsiflexion in the left toes as well as decreased pinprick sensation of the left foot. Dr. Stein opined that claimant had reached maximum medical improvement at the time of this evaluation.

Based on the *AMA Guides*, Dr. Stein rated claimant's left ankle at 7 percent to the lower extremity or a 3 percent whole person impairment. Claimant's lower back complaints placed in the DRE Lumbosacral Category II for a 5 percent impairment to the body as a whole. Total whole person impairment is 8 percent.

Dr. Stein placed permanent work restrictions regarding the left ankle as follows: (1) avoid frequent repetitive stair climbing; (2) minimal and low level ladder usage only; (3) no running; and, (4) limit standing or walking to no more than two hours at a time. No permanent restrictions for lower back strain were imposed. The doctor opined that claimant did not have any task loss in relation to his lower back.

On October 8, 2011, Dr. Stein reviewed additional medical records regarding the claimant. The doctor opined:

The statements of Mr. Elder on the Tyson application are in direct conflict with his statements to me regarding back pain. The examination he underwent reflecting acceptable lumbar range of motion is in conflict with a moderately restricted range of motion which he manifested on examination in my office on 11/17/09 as well as 9/22/11. Since the findings on his examination which lead to the 5% impairment were subjective and Mr. Elder's veracity is unreliable based upon today's review, I can no longer state within a reasonable degree of medical probability that he

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

sustained any injury to the lower back at work in 2009. I can no longer state within a reasonable degree of medical probability that he has a 5% impairment to the body as a whole under DRE lumbosacral category II. At this time, I believe DRE lumbosacral category I 'Complaints' which carries a 0% impairment is more appropriate.³

Both doctors relied upon claimant's subjective back complaints as diagnostic testing had not revealed any findings regarding claimant's back. Consequently, claimant's credibility is a significant factor in the determination whether he suffered any permanent impairment to his back. The record contains a variety of instances where claimant's statements are at odds with the actual facts including but not limited to his comments about his length of employment with Tyson, whether he had suffered accidents after October 2009 (automobile accidents), certain facebook photographs showing physical activities at variance with his testimony and his conviction of crimes involving dishonesty or false statement. And claimant's failure to seek treatment for his back also raises questions regarding his complaints of back pain.

The ALJ adopted Dr. Stein's last report and concluded claimant had failed to meet his burden of proof that he suffered permanent impairment to his back and was limited to a scheduled disability to the lower extremity. The Board agrees and affirms.

As previously noted, Dr. Stein rated claimant's impairment at 7 percent and the ALJ's Award will be recalculated based upon that percentage.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁴ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge John D. Clark dated February 9, 2012, is modified to reflect claimant suffered a 7 percent scheduled disability to the left lower leg.

The claimant is entitled to 7.29 weeks of temporary total disability compensation at the rate of \$320.02 per week in the amount of \$2,332.95 followed by 12.79 weeks of permanent partial disability compensation, at the rate of \$320.02 per week, in the amount of \$4,093.06 for a 7% loss of use of the left lower leg, making a total award of \$6,426.01.

³ Stein Depo., Ex. 4.

⁴ K.S.A. 2010 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this _____ day of June, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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